Office-Supreme Court, U.S.
FILED
MAR 21 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1076

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF LOUISIANA, TEXACO INC. and
THE LOUISIANA LAND AND EXPLORATION COMPANY,
Petitioners,

v.

DEPARTMENT OF ENERGY and
DONALD P. HODEL, Secretary of Energy,
Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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REPLY BRIEF FOR PETITIONERS

ALLAN ABBOT TUTTLE
Counsel of Record
JAMES R. PATTON, JR.
GEORGE M. BORABABY
PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000
Attorneys for Petitioner State of Louisiana

ANDREW J. KIRKPATRICK, JR.
WILLIAM O. LAMOTTE, III
RICHARD D. ALLEN
MORRIS, NICHOLS, ARSHT & TUNNELL
Twelfth & Market Streets
P.O. Box 1347
Wilmington, Delaware 19899
(302) 658-9200
Attorneys for Petitioner Texaco Inc.

JOHN R. COPE
THOMAS D. MANFORD, III
DARCI L. ROCK
BRACEWELL & PATTERSON
1825 I Street, N.W.
Washington, D.C. 20006
(202) 828-5800
Attorneys for Petitioner The Louisiana Land And Exploration Company

Other counsel for petitioners are listed on inside cover.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

THE HONORABLE DAVID C. TREEN
Governor, State of Louisiana

THE HONORABLE WILLIAM J. GUSTE, JR.
Attorney General, State of Louisiana

THE HONORABLE FRANK P. SIMONEAUX
Secretary, Department of Natural Resources,
State of Louisiana

THE HONORABLE PATRICK H. MARTIN
Commissioner of Conservation,
State of Louisiana

HARRY E. BARSH, JR.
DAVID R. FROHN
CAMP, CARMOUCHE, PALMER, BARSH & HUNTER
A Professional Law Corporation
P.O. Drawer 2001
Lake Charles, Louisiana 70602
(318) 433-9355
Of Counsel for Petitioner State of Louisiana

STEPHEN H. BARD
Texaco Inc.
2000 Westchester Avenue
White Plains, New York 10650
(914) 253-4000

PATRICK T. CAFFERY
CAFFERY, OUBRE, GIBBENS & BLACKWELL
420 Iberia Street
New Iberia, Louisiana 70560
(318) 364-1816
Of Counsel for Petitioner Texaco Inc.

J. HENRY PHILLIPS, III
CHARLES D. MARSHALL, JR.
MILLING, BENSON, WOODWARD, HILLYER,
PIERSON & MILLER
Eleventh Floor
Whitney Building
New Orleans, Louisiana 70130
(504) 581-3333
Of Counsel for Petitioner The Louisiana Land And Exploration Company

March 21, 1983

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REPLY BRIEF FOR PETITIONERS[1]

ARGUMENT

1. Respondents misstate the position of petitioners, as well as the holding of the court below, with the curious result that they claim as the governing proposition of law precisely the principle urged by petitioners: that separate reservoirs constitute separate "properties" when they correspond to separate "rights to produce." *See* Resp. Br. at 8.

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[1] All parent companies, non-wholly-owned subsidiaries and affiliates of petitioner Texaco Inc. are listed in Appendix H to the Petition for a Writ of Certiorari. Those of The Louisiana Land And Exploration Company are listed on p. ii note of the Petition.

Respondents mistakenly ascribe to petitioners the position that "property" is created by the mere "state recognition of geological facts such as reservoir boundaries, ..." Resp. Br. at 14. They then suggest that the court below rejected that interpretation of the "property" definition in favor of "an interpretation of the regulation focusing on the 'right to produce,' . . . ." *Id.*

In fact, petitioners' position throughout the relevant period and throughout this action has been that each reservoir-wide Louisiana Office of Conservation ("LOC") unit is a "property" because it is a "right to produce." The Temporary Emergency Court of Appeals ("TECA") rejected this claim below, not because it "focus[ed] on the 'right to produce,'" but because it ignored that concept and instead upheld DOE's "general position that the lease defines the property." Pet. App. at 18a. By this inversion of the proceedings below, respondents are led to a proposition all along urged by petitioners: that reservoir-wide "rights to produce" are "properties."

Respondents' error tellingly reveals TECA's inconsistency. Respondents appear to recognize that in earlier decisions, TECA has repeatedly held that "[t]he focus of the 'property' definition is upon the 'right to produce,' not the fee or leasehold nature of the ownership interest." *Grigsby v. Department of Energy*, 585 F.2d 1080, 1083, *modifying on rehearing* 585 F.2d 1069 (Temp. Emer. Ct. App. 1978), *cert. denied*, 440 U.S. 908 (1979); *Pennzoil Co. v. Department of Energy*, 680 F.2d 156, 168 (Temp. Emer. Ct. App. 1982). In *Pennzoil*, TECA emphasized that:

> The statement of the definition that "property means the right which arises from a lease or fee interest to produce crude petroleum" *is obviously quite different in meaning* than if the regulation had provided that "property means a lease or fee interest producing crude oil." [680 F.2d at 168 (emphasis added).]

Faced with TECA's abrupt departure in the decision below from its earlier decisions, respondents labor to fit the holdings into a consistent mold. But the effort is bootless. The decision under review specifically upheld DOE's "general position that the lease defines the property." Pet. App. at 18a.

These decisions cannot be reconciled in principle. Respondents attempt to distinguish the cases by noting that the units recognized as "properties" in *Grigsby* and *Pennzoil* were formed by aggregating portions of several leases or fee interests, while the reservoir-wide LOC units at issue here are formed by segregating discrete parts of a leasehold or fee interest. *See* Resp. Br. at 9-12. However, as TECA recognized in those cases, what counts for the purpose of identifying the "property" is not whether the unit is aggregated or segregated, but the derivation of the "right to produce" from that unit. The "right to produce" from both the units involved in *Grigsby* and the units at issue in this case derive from the same source: the orders of the LOC that establish and recognize those units. There is no meaningful way to distinguish between such units in determining the derivation of the "right to produce" and, hence, the "property."

It must be remembered that a producer in August 1973 had only the "property" definition itself for guidance in making "property" designations.[2] Under the position of respondents and the court below, a producer who in 1973 relied on the LOC unit rather than the lease in designating his "properties" would have been correct in the *Grigsby*-type situation but not in the situation presented in this case. The "property" definition itself admits of no such distinction, but focuses on one concept only: the "right to produce." Yet respondents and the court below would penalize producers for failing to foresee such an unstated distinction.

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[2] TECA's notion, quoted by respondents, that petitioners knew that they were adopting a novel interpretation, *see* Resp. Br. at 7, is therefore wholly unsupported in the record.

2. In deferring to DOE's interpretation, TECA did no more than determine that that interpretation was "reasonable" and "not clearly erroneous." Pet. App. at 14a, 16a. Yet TECA failed to recognize that DOE, in August 1976, was not interpreting a regulation that it had promulgated, but rather was interpreting a regulation adopted by another agency, the Cost of Living Council ("CLC"), fully three years earlier. Indeed, in its August 26, 1976 Notice, DOE attempted to determine, just as a court might, what CLC intended to signify by its definition of "property." Pet. App. at 66a-67a. DOE noted that the evidence as to CLC's intent "is not unambiguous"; that DOE had to "determine the legal significance of the words used to define the term"; and that DOE's general "lease defines the property" interpretation "appears . . . [to be] the reasonable meaning of the definition that CLC used. . . ." *Id.* at 66a. In short, DOE was no better situated in August 1976 to determine what the August 1973 CLC "property" definition meant than was a court. In such a circumstance, it was inappropriate for TECA to apply the minimal standard of review normally employed in reviewing an agency's interpretation of its own regulations.

It is significant that as late as April 1976, DOE itself believed that the 1973 "property" definition was intended to give effect to "the pre-existing regulatory concepts of state regulatory agencies." 41 Fed. Reg. 16179, 16180 (April 16, 1976); Petition at 6-7. Indeed, it referred specifically to LOC units, concluding that "in Louisiana each state-recognized unit may therefore appropriately describe a property, ..." 41 Fed. Reg. at 16180; Petition at 7. In this policy statement, DOE did not, as TECA and respondents state, merely "indicate[] the possibility that it might change its mind and adopt the definition contended for by [petitioners]." Pet. App. at 15a; Resp. Br. at 16. Rather, DOE was expressing its own interpretation of what the 1973 "property" definition meant "since the initiation of the price regulations." *See* 41 Fed. Reg. at 16180. DOE did not have any consistent

notion as to the scope of the "right produce" concept prior to August 1976. Thus, its first interpretation of that concept—that contained in its August 1976 Notice—does not merit the uncritical deference accorded it by the court below.

Respondents' reliance on the alleged change in policy that occurred with the enactment of the Energy Policy and Conservation Act, P.L. 94-163 ("EPCA"), is misplaced. *See* Resp. Br. at 4-5, 14. Respondents engage in the most remarkable contortion of language, *see* Resp. Br. at 2, to avoid saying that a primary objective of the two-tier pricing system instituted in August 1973 was, in the words of the court below, "that of stimulating increased domestic production of crude oil." Pet. App. at 14a. Respondents contend that that objective became of importance only with the passage of the EPCA in December 1975 and thus justified a change in the definition of "property." Resp. Br. at 14. To the contrary, increased production was a goal of the pricing system from its inception in August 1973. As DOE itself recognized in August 1976, petitioners' interpretation of "property" better comported with that objective than did DOE's general "lease defines the property" position. The EPCA thus does not support the supposed "reasonableness" of DOE's position and provides no reason for TECA to have deferred uncritically to that position.

3. Respondents' attempt to brush aside the effect of the decision below on the administration of the Windfall Profit Tax Act, P.L. 96-223, is similarly flawed. Regardless of the authority of the Secretary of the Treasury to change DOE regulations for tax purposes, the Secretary has in fact adopted a "property" definition that incorporates the "right to produce" concept and has basically tracked the language of DOE's August 1976 interpretation in defining "right to produce." 47 Fed. Reg. 50858, 50859 (November 10, 1982). Clarification of those terms by this Court is certain to control the application of those terms for windfall profit tax purposes.

CONCLUSION

For the foregoing reasons, and for those stated in the Petition, petitioners respectfully request that the writ of certiorari be allowed.

Respectfully submitted,

/s/ Allan Abbot Tuttle

ALLAN ABBOT TUTTLE
Counsel of Record
JAMES R. PATTON, JR.
GEORGE M. BORABABY
PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000
Attorneys for Petitioner State of Louisiana

ANDREW J. KIRKPATRICK, JR.
WILLIAM O. LAMOTTE, III
RICHARD D. ALLEN
MORRIS, NICHOLS, ARSHT & TUNNELL
Twelfth & Market Streets
P.O. Box 1347
Wilmington, Delaware 19899
(302) 658-9200
Attorneys for Petitioner Texaco Inc.

JOHN R. COPE
THOMAS D. MANFORD, III
DARCI L. ROCK
BRACEWELL & PATTERSON
1825 I Street, N.W.
Washington, D.C. 20006
(202) 828-5800
Attorneys for Petitioner The Louisiana Land And Exploration Company

THE HONORABLE DAVID C. TREEN
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THE HONORABLE WILLIAM J. GUSTE, JR.
Attorney General, State of Louisiana

THE HONORABLE FRANK P. SIMONEAUX
Secretary, Department of Natural Resources,
State of Louisiana

THE HONORABLE PATRICK H. MARTIN
Commissioner of Conservation,
State of Louisiana

HARRY E. BARSH, JR.
DAVID R. FRGHN
CAMP, CARMOUCHE, PALMER, BARSH & HUNTER
A Professional Law Corporation
P.O. Drawer 2001
Lake Charles, Louisiana 70602
(318) 433-9355
Of Counsel for Petitioner State of Louisiana

STEPHEN H. BARD
Texaco Inc.
2000 Westchester Avenue
White Plains, New York 10650
(914) 253-4000

PATRICK T. CAFFERY
CAFFERY, OUBRE, GIBBENS & BLACKWELL
420 Iberia Street
New Iberia, Louisiana 70560
(318) 364-1816
Of Counsel for Petitioner Texaco Inc.

J. HENRY PHILLIPS, III
CHARLES D. MARSHALL, JR.
MILLING, BENSON, WOODWARD, HILLYER,
PIERSON & MILLER
Eleventh Floor
Whitney Building
New Orleans, Louisiana 70130
(504) 581-3333
Of Counsel for Petitioner The Louisiana Land And Exploration Company

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